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No. 82-793

In the Supreme Court of the United States

OCTOBER TERM, 1982

RONALD R. HUDSON,

Petitioner,

vs.

SUSAN HUDSON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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II. TABLE OF AUTHORITIES

A. *Cases*

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C. *Legal Periodicals and Books*

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III. STATEMENT OF THE CASE

Pursuant to Rule 34.2 of the Rules of the Supreme Court of the United States, this Statement of the Case is made specifically for the purpose of correcting an inaccuracy in Petitioner's Statement of the Case. Respondent specifically disagrees with Petitioner's statement that Petitioner (hereinafter "Husband") moved the two natural children of the parties to Rota, Spain, with him, after receiving repeated complaints from Respondent (hereinafter

"Wife") that she was unable to properly care for them (Pet. Br. 5). Nowhere in the record of proceedings, the transcript or the Court of Appeals Decision is there any evidence of "repeated complaints from Wife that she was unable to properly care for them." In fact, the recitation of the facts in this case by the Indiana Court of Appeals refers in two separate places to Husband's forcible and unilateral removal of these children from Indiana on March 12, 1980 (App. Pet. Br. 3, 15). Husband has not challenged the Trial Court's decision to award custody of the three children to Wife, but has only challenged the Court's jurisdiction.

IV. SUMMARY OF ARGUMENT

The decision below was in accordance with the body of law that has held that personal jurisdiction is not required in a child custody determination under the Uniform Child Custody Jurisdiction Act (hereinafter "UCCJA"). Furthermore the decision below has not removed the fundamental protection of due process afforded Husband under the Fourteenth Amendment of the United States Constitution. There is no question of law at issue that justifies the grant of a writ of certiorari here.

V. ARGUMENT

In holding that custody is in effect an adjudication of a child's status, the Indiana Court of Appeals relied on the status exception as enunciated in *Shaffer* v. *Heitner*, (1977) 433 U.S. 186. (App. Pet. Br. 20). Jurisdiction under the UCCJA is centered around the paramount issue of the best interests of the child, not the feuding parents. Therefore, the Uniform Act focuses primarily on the State where the child and family, not a single parent, maintain significant connections. Using this rationale, the Court of Appeals in Indiana found that the UCCJA's jurisdictional provisions aligned with the requirements of *Shaffer* (App. Pet. Br. 23). In fact, assumption of jurisdiction by a forum meeting the jurisdictional requirements of the UCCJA satisfies the traditional notices of fair play and substantial justice which are embodied in the due process clause.

Petitioner seeks review of this case because of the supposed existence of totally conflicting State Court decisions on this issue and relies primarily on the following three decisions rendered by this Court, *Kulko* v. *Superior Court of California*, 436 U.S. 84 (1978), *Shaffer* v. *Heitner*, *supra* and *May* v. *Anderson*, 345 U.S. 528 (1953). It is not only unnecessary in the case at bar to further define the precise scope of this doctrine, but *Kulko* and *May* may not even be applicable. The decision in *May* is specifically limited to cases where "child snatching" is not involved, thus it is clearly distinguishable from the case at bar. A footnote in *May* v. *Anderson*, 345 U.S. 528, 535 n. 8 (1953) states:

> . . . The instant case does not present the special considerations that arise where a parent, with or without

minor children, leaves a jurisdiction for the purpose of escaping process or otherwise evading jurisdiction, and we do not have here the considerations that arise when children are unlawfully or surreptitiously taken by one parent from the other.

Even if *May* does apply, the UCCJA should be interpreted as permitting long-arm jurisdiction. *May* is a plurality opinion which has enjoyed little acceptance. When *May* was decided, it was mostly true that *in personam* jurisdiction could be acquired only by personal service of summons within the State. However, the expansion of long-arm jurisdiction after 1953 lessened the impact of *May* on custody jurisdiction, and it was during this period that the UCCJA was drafted. For the most part the drafters ignored the due process implications of *May* and treated custody jurisdiction as purely *in rem*. The dilemma in *May* is compelling evidence that the complexity of interstate custody jurisdiction problems is not susceptible to solution by constitutional fiat. Eventually the UCCJA redefined the bases of custody jurisdiction, and this legislation now governs child custody jurisdictions in forty-eight states. See Garfield, *The Absent Parent's Due Process Rights in Interstate Custody Conflicts: A Commentary on Marriage of Hudson*, to be published, 16 *Ind. L.R.* N2 (1982).

When the quotations from *May* relied upon by Petitioner are read in accord with Justice Frankfurter's concurring opinion, a very different picture is presented. Justice Frankfurter posited the plurality view of *permitting* states to recognize foreign custody decrees rendered without personal jurisdiction over an absent parent under local law but not *requiring* them to do so under the full faith and credit clause. *May* at 535-36. Respondent respectfully suggests that this is the more accepted view of *May*

than Petitioner's argument that *May* requires that jurisdiction over the person must be obtained. (Pet. Br. 10).

Petitioner next relies upon *Kulko* v. *Superior Court of California,* 436 U.S. 84 (1978) and argues that this case stands for the proposition that due process requirements of minimal contacts and fundamental fairness are just as applicable to domestic relations as to commercial transactions. (Pet. Br. 14). *Kulko* is significant because it involved *in personam* jurisdiction in a domestic relations setting, although it is distinguishable from the instant case because it was concerned with jurisdiction over child support, rather than child custody. This Court in *Kulko* seemed to apply a more strict standard to child support cases than it applies in commercial cases. However, it does not necessarily follow that the higher standard would apply in all domestic relations cases. Domestic relations jurisdiction already covers the entire spectrum of standards for minimum contacts, from the most restrictive (child support) to the least restrictive (marital status).

With respect to child custody jurisdiction, it remains to be seen where the fine point along that spectrum should be drawn. Professor Garfield suggests that the Court should decline to fix the minimum contact standard for custody jurisdiction at either end of the spectrum. She contends that there are important differences between divorce and custody litigation. The absent parent has a far greater interest in custody than an absent spouse has in maintaining a marriage in limbo. At the other end of the spectrum, the distinction between child custody and child support is just as clear. A child support action is essentially a dispute over money, but in a non-commercial context, so that the Court found it necessary to apply a minimum contact standard more restrictive than that used in commercial cases. Further, the nature of support liti-

gation is such that it can be conducted more easily at long distances than custody litigation. In custody litigation, the child's interests in the availability of a forum and the state's obligation to provide such a forum are far greater than in support actions. Insofar as the minimum contacts test is concerned, the near-universal adoption of the UCCJA by the states suggests that there is agreement that this statute provides the best solution to the complex problems raised by custody litigation in a Federal system. See Garfield, *supra.*

Even if the minimum contacts requirement does apply, it may be persuasively argued that the child's significant "connection" to the state and the presence in the state of "substantial evidence" concerning the child are adequate. In effect, the child's contacts with the state would have to be attributed to the parent. In most cases this would not stretch the concept of minimum contacts too far, considering the great need of the child for a forum with authority to decide its custody, the duty of the state to provide such a forum, and the due process protection afforded the absent parent by the requirements of notice and opportunity to be heard. See Garfield, *supra.*

VI. CONCLUSION

It is respectfully submitted that Petitioner has wholly failed to sustain its burden of establishing that a state statute is repugnant to the constitution. Petitioner cites only two cases, *Pasqualone* v. *Pasqualone,* 63 Ohio St. 2d 96, 406 N.E.2d 1121 (1980), and *State ex rel. Muirhead* v. *District Court of First Judicial District,* 196 Mont. 535, 550 P.2d 1304 (1979), to support its contention that there is a virtual smorgasboard of holdings on this issue. When viewed in the proper context, it is clear that there is not the totally conflicting State Court decisions as the Peti-

tioner suggests. The decision below correctly held that the Trial Court's assertion of jurisdiction over the custody proceeding without obtaining *in personam* jurisdiction over Husband did not violate his due process rights.

For all the reasons set forth above, it is respectfully submitted that Husband's petition for certiorari should be denied.

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